



**Legislative Affairs
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LABOR AND EMPLOYMENT LAW COMMITTEE

**A.7847-A
S.4956**

**Assembly Member Aubry
Senator Volker**

AN ACT that establishes a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that an employer has been negligent in hiring or retaining an applicant or employee in certain circumstances.

THIS LEGISLATION IS APPROVED

The New York City Bar Association urges the enactment of A.7847-A/S.4956, which would create a rebuttable presumption in favor of excluding evidence in negligent hiring cases of an employee's past criminal record in instances where employers evaluate the factors set forth in Article 23-A of the Correction Law §752 and make reasonable, good faith determinations that such factors militate in favor of hire or retention of the applicant or employee. The proposed legislation is intended to help ex-offenders fully reintegrate into society by removing barriers to employment.

The unemployment rate for ex-offenders in New York is very high – up to sixty (60%) of ex-offenders are unemployed one year after release.¹ Moreover, there is a strong statistical correlation between unemployment and recidivism. For example, in New York State, eighty-three (83%) of individuals who violate the terms of their probation are unemployed at the time of the violation.² Without employment, ex-offenders are unable to meet their basic needs and fully reintegrate into society.

Ex-offenders, however, face a number of barriers to reentry into the workforce. The initial barrier is the employment application itself, which often asks the applicant, "Have you ever been convicted of a crime?" Many employers are forced to ask this question to avoid negligent hiring or other legal claims. Under a negligent hiring theory,

¹ Center For Employment Opportunities, Issue Overview: Crime and Work, available at http://www.ceoworks.org/roundcrime_work012802.pdf (last visited Jan. 24, 2007).

² Id.

for example, the employer's liability arises from its failure to take reasonable care in making hiring decisions, thereby placing the newly hired employee in a position to cause foreseeable harm to others. The negligent hiring theory creates an incentive for employers to avoid hiring previously incarcerated individuals. In an apparent effort to avoid such tort exposure, many employers choose not to hire ex-offenders when they apply for employment.

This legislation does not change an employer's responsibility under New York law to make sure an ex-offender is fit to be employed in a specific job. To decide to hire an ex-offender, an employer must consider if there is a "direct relationship" between the criminal conviction and the specific employment sought, or if the employment would involve a reasonable risk to property or personal safety. The employer still has to make sure that the applicant meets certain standards. This legislation aims only to lower the risk for employers who do go through the necessary steps to hiring an ex-offender. The employer must consider if there is a legitimate interest in protecting property, the safety of specific individuals, and the safety of the general public. The employer must also weigh the specific duties and responsibilities of the employment and what relevance the ex-offender's criminal history could have on his or her suitability for the job, as well as the time that has elapsed since the criminal conduct occurred and the age of the occurrence. Lastly, the employer must deliberate on the seriousness of the applicant's offense(s), and any evidence of rehabilitation that the ex-offender presents (i.e. Certificate of Relief from Disabilities or Certificate of Good Conduct).

A.7847A/S.4956 will help to remove barriers to employment, by giving conscientious employers an incentive to hire ex-offenders. The legislation would amend Section 296(15) of the New York Human Rights Law to create a rebuttable presumption in favor of excluding in a negligent hiring case evidence of an employee's past criminal record where the employer has complied with Article 23-A of the Correction Law. Therefore, employers who comply with Article 23-A by making a good faith, reasonable determination to hire a person with a criminal record are offered some protection from lawsuits and ex-offenders are given more opportunities to obtain employment and reintegrate into society.

We urge the Legislature to implement this amendment to the Human Rights Law and effectively reduce litigation and lower recidivism rates in New York State.